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E-Mail Service in New York State

Anastazia Sienty

Dedicated to Genoveffa Flagello for your help, Glenn Carroll for waiting up, and Meroslaw Sienty for laughing.

An Overview

"Fwd: > > > Fwd: > > > Fwd: > > > RE: LAWSUIT ! ! < < < < "

When you hear about service by e-mail, what do you think? "It looks like junk mail." "I haven't check my e-mail in weeks." "I'll delete it and pretend I didn't get it." "I don't understand, this can't be a real thing."

There are over 2.5 billion e-mail users in the world.[1] What was once a novel personal method of communication has become a preferred method of business communication. E-mail is entrusted with business contracts, airline tickets, medical records, bank statements, mortgage documents, and is increasingly relied upon by New York courts. C.P.L.R. § 308 instructs how to serve process in New York State. Although it does not expressly include service by e-mail, case law is evolving so that service via e-mail is increasingly accepted by New York courts.

This article will review New York's service statute, C.P.L.R. § 308, in light of today's culture and communications. Part One reviews the Constitutional framework of service, the statutory demands for e-mail as a method of service with appropriate leave of court, and provides an overview of the statute. Part Two reviews the evolution of New York case law. Part Three focuses on "how to" use C.P.L.R. § 308(5) to obtain service of process by e-mail. Part Four contemplates the future of service via e-mail.

1. THE RADICATI GRP., INC., E-MAIL STATISTICS REPORT, 2015-2019 1, 3 (2015), http://www.radicati.com/wp/wp-content/uploads/2015/02/Email-Statistics-Report-2015-2019-Executive-Summary.pdf.

Today, people are more mobile than ever. Over 4.1 billion e-mail accounts exist worldwide.[2] E-mail has become an integral part of communication between people, encouraged by its necessary partnership with social media, networking sites, and the desire to maintain a presence on the Internet.[3] For many people, e-mail is a primary form of communication. Would it really be unfair to allow its use for the purposes of formally notifying someone that they are a defendant in a court proceeding?

I. Proper Service Involves Due Process

One of the first cases to permit service via e-mail was a federal case, *Rio Properties, Inc. v. Rio International Interlink* where the 9th Circuit found service via e-mail to be reasonably calculated to "apprise . . . [defendant] . . . of the pendency of the action and afford it an opportunity to respond."[4] While the Constitution does not specify any particular method of service, notice to a defendant is a fundamental requirement of constitutional due process.[5]

"In proper circumstances, this broad constitutional principle unshackles the federal courts from anachronistic methods of service and permits them entry into the technological renaissance."[6] Although communication via e-mail and over the Internet is comparatively new, such

2. THE RADICATI GRP., INC., E-MAIL STATISTICS REPORT, 2014-2018, 1, 2 (2014), http://www.radicati.com/wp/wp-content/uploads/2014/01/Email-Statistics-Report-2014-2018-Executive-Summary.pdf.

3. *Id.* at 3.

4. Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1017 (9th Cir. 2002) (Discussing situation in which a hotel and casino operator brought a trademark infringement action against an international company that primarily operated through the Internet. The only U.S. address provided by defendant was that of its courier in Miami, Florida. The business was designed to operate via the Internet and did not provide any permanent location. Only e-mail and a website were used for communication.).

5. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

6. *Rio Props.*, 284 F.3d at 1017.

communications have been zealously embraced within society at large and the business community in particular.[7]

When authorizing service via e-mail, New York courts require compliance with New York State procedural rules and constitutional due process. The state's interest in bringing its citizens' issues to final settlement must be balanced against the individual's interest in the opportunity to be heard as protected by the 14th Amendment.[8] While there is no specific test for due process, the United States Supreme Court in *Mullane v. Central Hanover Bank & Trust Co.* proclaimed due process requirements from precedent and required service to be reasonably calculated to apprise interested parties of the action.[9] Due process requires that the method chosen for notice be crafted with the purpose of actually informing the defendant.[10] Service via e-mail may be defended on two grounds: (i) e-mail is reasonably calculated to provide notice of the pending action and (ii) e-mail is not substantially less likely to provide notice than the customary methods of providing notice.[11]

A. *Service of Process is Calculated to Provide Notice, Not Jurisdiction*

C.P.L.R. § 308 is a notice statute, not a procedural statute. The statute and case law strive to provide an opportunity to be heard, and the statute acknowledges that this is only possible if the defendant is made aware of the action. Under C.P.L.R. § 308(5), the courts mandate outcome, not process. In this way, the law adapts to society's changing cultural norms.

B. *The Evolution of Jurisdiction and Communication*

7. *Id.*

8. *Mullane*, 339 U.S. at 313-14.

9. *Id.* at 314-15 (citations omitted) ("[N]otice [must be] reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information and it must afford a reasonable time for those interested to make their appearance.").

10. *Id.* at 315.

11. *Id.*

Marching forward with technological advances, courts have permitted service through a variety of means. In 1970, a district court ordered service of process via telex.[12] In 2000 a district court permitted service via facsimile where the defendant refused to provide a permanent street address and only provided a permanent e-mail address and fax number.[13] A federal court even ordered service via television where the plaintiff was required to provide notice to the defendant via newspaper publication and paid television advertisements.[14] Characteristics of the Internet were carefully considered by the court in *Zippo Manufacturing Company v. Zippo Dot Com, Inc.* where the court analyzed personal jurisdiction against the introduction of the sliding scale of website interactivity.[15]

C. *The Statutory Framework: Overview of Service of Process*

In New York State, C.P.L.R. § 308 governs personal service of process upon a natural person, which may be made by any of the following five methods:

1. "by delivering the summons within the state to the person . . .; or
2. "by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place, or usual place of abode of the person to be served . . .; or
3. "by delivering the summons within the

12. *See* New Eng. Merch. Nat'l Bank v. Iran Power Generation & Transmission Co., 495 F. Supp. 73, 81 (S.D.N.Y. 1980); *Telex*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/telex (last visited Oct. 9, 2015) (Telex is a communication system where messages are sent over long distances using a telephone system and are printed using a machine called a teletypewriter).

13. *In re* Int'l Telemedia Assocs., Inc., 245 B.R. 713, 718 (Bankr. N.D. Ga. 2000).

14. Smith *ex rel.* Smith v. Islamic Emirate of Afg., 262 F. Supp. 2d 217, 220 (S.D.N.Y. 2003).

15. Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997).

> state to an agent for service of the person to be served as designated under rule 318 . . .; or
> 4. "where service under paragraphs one and two cannot be made with due diligence, by affixing the summons to the door of either the actual place of business, dwelling place, or usual place of abode within the state of the person to be served . . ."; or
> 5. "in such manner as the court, upon motion without notice, directs, if service is impracticable under paragraphs one, two and four of this section."[16]

Methods one and three are one-step processes of personal delivery. Method two is a two-step process of delivery and mailing (sometimes mailing is to a different address than where the papers were delivered). Method two is known as "leave and mail" service. Notice is left at defendant's last known residence, usual place of abode, or actual place of business followed by mailing the summons within 20 days.[17] Service is complete ten days after filing.[18]

Method four is a three-step process which is only permissible if you fail to accomplish service under methods one or two. It is commonly referred to as "nail and mail."[19]

Method five is the wild card under which the courts may devise service calculated to give notice to defendant where no other method of service under C.P.L.R. § 308 is possible. C.P.L.R. § 308(5) is a notice statute. It does not confer jurisdiction. It merely asks a party to "[p]resent a basis of jurisdiction, [and] an expedient order under § 308(5) may be

16. N.Y. C.P.L.R. § 308 (McKinney 2016). For context regarding C.P.L.R. § 308(3): "A person may be designated by a natural person, corporation or partnership as an agent for service in a writing . . . ." N.Y. C.P.L.R. § 318 (McKinney 2016).

17. N.Y. C.P.L.R. § 308(2) (McKinney 2016).

18. *Id.* (". . . . except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law . . . .").

19. N.Y. C.P.L.R. § 308(4) (McKinney 2016).

framed."[20]

A handful of recent New York State court decisions have embraced C.P.L.R. § 308(5) as the accidental hero for the evolution of a 45 year old service statute.[21] When an attorney is in the unfortunate situation of being unable to effect service by personal delivery, "leave and mail," or "nail and mail" then C.P.L.R.§ 308(5) allows the court, in its own discretion, to fashion a method of service upon ex parte motion and without notice,[22] provided (i) the serving party must make an ex parte motion for expedient service,[23] (ii) the court must be satisfied that service is "impracticable" under the specific provisions of subdivisions 1, 2, and 4, and (iii) the requested alternate service is reasonably calculated to provide defendant notice of the action against her.[24]

II. New York Case Law Accepts Service Via E-mail

Three New York cases analyze the use of C.P.L.R. § 308(5) to provide notice by e-mail. *Hollow v. Hollow* discusses the meaning of "impracticable" before determining that service under C.P.L.R. § 308(1), (2), and (4) were indeed

20. Arroyo v. Arroyo, 351 N.Y.S.2d 536, 539 (Sup. Ct. 1974).

21. N.Y. C.P.L.R. § 308 (McKinney 2016).

22. *Id.*

23. N.Y. C.P.L.R. § 308(5) is often referred to as both "expedient service" and "alternative service." Kelly v. Lewis, 632 N.Y.S.2d 186, 186 (App. Div. 2d Dept. 1995); Hitchcock v. Pyramid Ctrs. of Empire State Co., 542 N.Y.S.2d 813, 814 (App. Div. 3d Dept. 1989); Saulo v. Noumi, 501 N.Y.S.2d 95, 96 (App. Div. 2d Dept. 1986); Markoff v. S. Nassau Cmty. Hosp., 458 N.Y.S.2d 672, 673 (App. Div. 2d Dept. 1983); Liebeskind v. Liebeskind, 449 N.Y.S.2d 226, 228 (App. Div. 1st Dept. 1982) (expedient service). Simens v. Sedrish, 440 N.Y.S.2d 687, 688 (App. Div. 2d Dept. 1981); Giordano v. McMurtry, 433 N.Y.S.2d 583, 584 (App. Div. 1st Dept. 1980); Arroyo, 351 N.Y.S.2d at 539; Deason v. Deason, 343 N.Y.S.2d 276, 279 (Sup. Ct. 1973); Prince v. Prince, 329 N.Y.S.2d 963, 964 (Sup. Ct. 1972) (alternative service).

24. *See* Dobkin v. Chapman, 236 N.E.2d 451 (N.Y. 1968) (Consisting of three cases consolidated for appeal where plaintiffs sued for recoveries of personal injuries sustained in automobile accidents. The Court of Appeals affirmed three ex parte motions which permitted service by ordinary mail to defendants at their Pennsylvania addresses, service by publication in a Brooklyn newspaper, and service by mail to defendant's last known address in conjunction with delivery of copies to the insurance carrier.).

impracticable.[25] *Snyder v. Alternate Energy Inc*, recognized that e-mail has become a customary form of communication and may, under certain circumstances, be reasonably calculated to provide notice of the action to the defendant.[26] *Alfred E. Mann Living Trust v. ETIRC Aviation S.A.R.L.* found due process where the defendant had waived his right to statutory notice in favor of notice via e-mail.[27]

A. *Hollow v. Hollow*

Hollow v. Hollow, a divorce action, was the first case in which a New York court was asked to effect personal service via e-mail.[28] Mr. Hollow left his marital home in 1999 and moved to Saudi Arabia where he lived and worked on a private company compound. The only contact he had with his wife was through his e-mail account. Multiple attempts to serve Mr. Hollow failed due to the secure nature of the property and because he rarely left the company compound.[29]

After several failed attempts at service, the plaintiff motioned the court for leave to serve the defendant via e-mail under C.P.L.R. § 308(5).[30] Per the statute, the court first found that service under C.P.L.R. § 308(1), (2), and (4) was impracticable as plaintiff made reasonable efforts under the circumstances to effect service by employing an international process server and attempting service through the defendant's employer. The process server hired by the plaintiff submitted an affidavit describing his various attempts to serve the defendant. Effecting legal service in the Kingdom of Saudi Arabia was unworkable as it required government intervention and could take twelve to eighteen months to complete. Since the husband rarely left the company compound, in-hand service was virtually impossible. Serving a member of the security staff could result in the process server being arrested since the

25. Hollow v. Hollow, 747 N.Y.S.2d 704, 705 (Sup. Ct. 2002).

26. Snyder v. Alternate Energy Inc., 857 N.Y.S.2d 442 (Civ. Ct. 2008).

27. Alfred E. Mann Living Trust v. ETIRC Aviation S.A.R.L., 910 N.Y.S.2d 418 (App. Div. 1st Dept. 2010).

28. *Hollow*, 747 N.Y.S.2d at 705.

29. *Id.* at 704.

30. *Id.* at 705.

defendant's employer refused to accept service on his behalf.[31]

After finding statutorily authorized service to be impracticable, the court next analyzed the Internet's place in daily life and determined that while the question of serving notice via e-mail is one of first impression, the effect of emerging technologies is recognized by New York's common law.[32]

Satisfied that common law will accommodate changing technology, the court next reviewed cases that approved service via e-mail within federal law or other states' laws. The New York court found that under appropriate circumstances, service via e-mail can meet the constitutional due process requirement of being reasonably calculated to provide notice and an opportunity to respond.[33]

Ultimately, the court found that Mr. Hollow had made statutory service impracticable when he "secreted himself behind a steel door, bolted shut, communicating with the plaintiff and his children exclusively through e-mail."[34] While the court was concerned with the difficulty of verifying Mr. Hollow's receipt of an e-mail message, a "constitutionally proper method of effecting substituted service need not guarantee that in all cases the defendant will in fact receive actual notice."[35] The court ordered service to Mr. Hollow's last known e-mail address coupled with service by international registered air mail and international standard mail.[36]

The court was right to find that service was impracticable under these circumstances. The plaintiff had attempted service at every known address, she made a legitimate and meaningful effort to locate the defendant, and access to the defendant's residence was physically impossible. By choosing only to correspond with his wife and children via e-mail, the defendant showed that this particular e-mail address belonged to him, was used regularly, and that he received messages through this

31. *Id.*

32. *Id.* at 707.

33. *Id.* (discussing Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

34. *Id.* at 708.

35. *Id.*

36. *Id.*

e-mail address. If the husband can communicate out from this address, then the wife can communicate in.

B. *Snyder v. Alternate Energy Inc.*

While the facts of *Hollow v. Hollow* are unique, the facts of *Snyder v. Alternate Energy Inc.* are more routine. *Snyder* involved a breach of contract for services performed and expenses incurred by the plaintiff. *Snyder* analyzed the practicality of e-mail communications in daily life. The court permitted Snyder to serve Energy Inc. and its president, Peter Nelson, via e-mail as part of a customized plan for alternate service devised by the court.[37] In *Snyder* the plaintiff submitted affirmations from attorneys, process servers, and the plaintiff to establish the impracticability of personal or mailed service on Energy Inc. and Peter Nelson.[38] The plaintiff demonstrated that despite a rigorous search (which included subpoenaing a telephone service, utilizing people locators, and searching court dockets) it was unable to locate a valid home or business address for either defendant.[39] The defendants had abandoned their New York and Connecticut addresses leaving no forwarding information.[40]

Defendant Peter Nelson's physical location could not be established, but the plaintiff did communicate with Mr. Nelson on a handful of occasions through AOL instant messenger and e-mail. In demonstrating to the court its efforts to locate the defendants, the plaintiff showed that Mr. Nelson maintained a regular on-line presence with AOL Instant Messenger's Buddy List.[41] Days before making the motion to the court for alternate service, the plaintiff sent an e-mail to Mr. Nelson requesting his physical address. Although Mr. Nelson did not reply, the

37. Snyder v. Alternate Energy Inc., 857 N.Y.S.2d 442, 443-44 (Civ. Ct. 2008); *cf.* N.Y. C.P.L.R. § 308(5) (McKinney 2016) (governing personal service); N.Y. C.P.L.R. § 311 (McKinney 2016) (governing service upon corporations); N.Y. C.P.L.R. § 311(b) (McKinney 2016) (stating that where service is "impracticable," service may be made as directed by the court upon motion without notice).

38. *Snyder*, 857 N.Y.S.2d at 444.

39. *Id.* at 445.

40. *Id.*

41. *Id.* at 447.

plaintiff received a receipt from AOL indicating that the e-mail had been read.[42]

After determining that statutory service was impracticable, the court focused on the constitutional due process requirements of service and the realities of e-mail as a communication tool. The question was, can e-mail be reasonably calculated to give a defendant notice of a pending lawsuit?[43] The court compared e-mail to three traditional alternative methods of service: publication of a summons in a newspaper, service upon a defendant's family member or attorney, and service by mail to the last known address.[44] Like these methods, there is no guarantee that the intended person will actually receive the message – service by publication is almost certain not to be seen and postal mail is never assured to make it into the hands of the intended recipient.[45] However, Mr. Nelson's conduct demonstrated that he could be reached via e-mail. His regular on-line presence and his previous e-mail communications made it reasonable that Mr. Nelson would receive notice of the pending action if sent via e-mail.[46]

Snyder's court-ordered cocktail of communications were adequate to quell concerns that an e-mail would be ignored, deleted, or caught in a spam filter. Court-ordered service included two e-mails with prominent subject lines, paper notice mailed to the defendant's last known Connecticut and New York addresses, and a phone call to Mr. Nelson's cell phone informing him that a summons had been sent by e-mail and regular mail.[47] The court reinforced e-mailed service with other actions likely to attract the defendants' attention.

C. *Alfred E. Mann Living Trust v. ETIRC Aviation S.A.R.L.*

In a trust case decided on contract theory, *Alfred E. Mann Living Trust v. ETIRC Aviation S.A.R.L.* the court found that a person may contract away their right to statutory notice in

42. *Id.* at 445.
43. *Id.*
44. *Id.* at 447.
45. *Id.* at 448.
46. *Id.* at 445, 449.
47. *Id.*

favor of legal notice via e-mail.[48]

Defendant, Roland Pieper a resident of the Netherlands, had signed as a personal guarantor to cover ETIRC's obligations.[49] When a suit ensued, Mr. Pieper objected to service upon him because it was e-mailed to him.[50] Mr. Pieper had expressly waived all formal service for any actions that might arise out of the guaranty and had consented to receive such service by the same method as he received communications regarding the trust – by e-mail. [51]

Because the guaranty required Mr. Pieper to provide two e-mail addresses at which to receive all communications regarding the trust,[52] the court found that "service of process at these addresses is, by definition 'reasonably calculated' to apprise Mr. Pieper of the action and thus comports with the requirements of due process."[53]

Here, e-mail is treated no differently than waiving your right to personal service in favor of mailed service. It was known that the defendant's e-mail address was actually used because this was his official means of communication under this contract. Conceptually, allowing e-mail for service is little different than courts around the country utilizing e-filing where litigants agree in advance to accept court communications via e-mail.[54] In *Alfred E. Manning Trust* the defendant had similarly agreed in advance to accept communications via e-mail.

48. Alfred E. Mann Living Trust v. ETIRC Aviation S.A.R.L., 910 N.Y.S.2d 418 (App. Div. 1st Dept. 2010).

49. *Id.*

50. *Id.* at 420.

51. *Id.* at 421.

52. *Id.* at 420.

53. *Id.* at 423.

54. Attorneys and pro se litigants register for the website, provide an e-mail address as a necessary means of contact and agree that this e-mail address is the primary means of communication for the case. *See* N.Y.S. UNIFIED CT. SYS., *Filing by Electronic Means*, https://www.nycourts.gov/COURTS/nyscourtofclaims/efiling-instructions.shtml.

III. How to Utilize C.P.L.R. § 308(5) to Authorize Service of Process by E-Mail

A. *Step 1: Make an Ex Parte Motion*

C.P.L.R. § 308(5) requires the party that is requesting alternate service from the court to make an ex parte motion.[55] Otherwise, service may be incomplete even where the defendant actually did receive the summons.

In *Badenhop v. Badenhop*, a divorce action, the movant improperly requested alternate service with an order to show cause.[56] The court stated that alternate service is to be requested by motion "and determined ex parte upon affidavits which establish that service is impracticable under subdivisions 1, 2, and 4 of that section."[57] In *DeCarvalhosa v. Adler*, an action to recover rent, the plaintiff served defendant at his mother's house instead of at his residence.[58] The Supreme Court erroneously approved this service upon the plaintiff's cross motion deeming service sufficient under C.P.L.R. § 308(5) nunc pro tunc.[59] The Appellate Court reversed the Supreme Court's decision because C.P.L.R. § 308(5) requires "that court-ordered" service be authorized only "upon motion without notice" even though the Appellate Court agreed that the statutory methods of service were impracticable under the circumstances.[60] In *Abshier v. Sunset Recordings*, the plaintiff attempted service a total of seven times including once by e-mail. The judge denied such alternate service because the plaintiff failed to first make an ex parte motion. The plaintiff only asked for such an order as part of her response to defendant's motion to dismiss.[61]

55. N.Y. C.P.L.R. § 308(5) (McKinney 2016).

56. Badenhop v. Badenhop, 444 N.Y.S.2d 112, 772 (App. Div. 2d Dept. 1981).

57. *Id.*

58. DeCarvalhosa v. Adler, 748 N.Y.S.2d 755 (App. Div. 1st Dept. 2002).

59. *Id.*

60. *Id.* at 756.

61. Abshier v. Sunset Recordings, Inc., No. 14 Civ. 3227 (CM) (SN), 2014 U.S. Dist. LEXIS 119742, at *17 (S.D.N.Y. Aug. 5, 2014).

B. *Step 2: Show that Service under All Other Methods is Impracticable*

1. The Meaning of Impracticable

The meaning of "impracticable" in the context of § 308(5) depends on the facts and circumstances surrounding each case. It is a situation where service under any other method would be futile.[62] The purpose is to cure the unpredictable circumstances in which the plaintiff cannot adhere to the prescribed methods so the court is given discretion to fashion other means adapted to the particular facts of the case.[63] The statute's legislative history is helpful in understanding this

62. Liebeskind v. Liebeskind, 449 N.Y.S.2d 226, 228 (App. Div. 1982). In *Liebeskind*, a divorce case in which the defendant-wife fled to avoid service, the court properly ordered expedient service per C.P.L.R. § 308(5). The plaintiff was not required to show that previous attempts at service were made. The court's opinion offers a robust explanation of impracticability:

> Simply because Special Term did not require plaintiff to demonstrate that prior attempts at service were undertaken is not error. Subdivision 5 requires no such prior attempts. All that need be shown is that other means of service are impracticable. This the plaintiff did. Nor was plaintiff required to demonstrate due diligence before resorting to service pursuant to subdivision 5. The only limitation contained in subdivision 5 is the requirement of impracticability of the other forms of service. In our opinion, the standard to determine compliance therewith is somewhat less than the "due diligence" as required by subdivision 4. Support for this conclusion can be found in C.P.L.R. 306(c), which requires that where service under subdivision 4 is undertaken, the particulars as to the attempted service under subdivisions 1, 2 or 3 must be detailed. In other words, due diligence must be proven by a showing of specific instances of attempted service. However, no such requirement exists for service under subdivision 5. Here the Court in issuing the ex parte order did fulfill all obligations imposed upon it.

Id. at 228-29.

63. Dobkin v. Chapman, 236 N.E.2d 451, 455 (N.Y. 1968).

purpose.[64]

Alternate service has no antecedent in the Civil Practice Act.[65] Committee comments state "that a primary aim of the revision was '[t]o make it possible, with very limited exceptions, for a litigant in the New York courts to take full advantage of the state's constitutional power over persons and things.'"[66] The only limit to the court's power, is its imagination, the facts, and the impracticability standard.[67] With alternate service as a tool, New York litigants are much more likely to receive notice and justice can find those who seek to dodge service.

2. A Showing of Impracticability Requires Less than a Showing of Due Diligence

For the court to order service of process under C.P.L.R.§ 308(5), the movant must show that service under all other statutory methods is futile and thus impracticable. This of course, depends on the facts and circumstances of each case.[68] Impracticable must not be confused with the more stringent standard of due diligence.[69]

Impracticability does not require a showing that actual

64. It should be noted that earlier versions of the statute require service to be impracticable under "subdivisions 1, 2, *or* 4" and later versions require "subdivisions 1, 2, *and* 4" (emphasis added). This does not appear to change the analysis when showing impracticability. Additionally, note that cases before 1972 refer to alternate service as section four, because at that time the legislature added what is present-day section three, thus bumping alternate service down to section five of C.P.L.R. § 308. *Id.* at 456.

65. This is the predecessor to the Civil Practice Law and Rules (C.P.L.R.). *Zimmerman's Research Guide,* https://law.lexisnexis.com/infopro/zimmermans/disp.aspx?z=1291.

66. *Id*. (citing SECOND PRELIMINARY REP. OF THE ADVISORY COMM. ON PRACTICE AND PROCEDURE, N.Y. LEGIS.DOC., 1958, No. 13, at 37).

67. *Id.* at 498.

68. Simens v. Sedrish, 440 N.Y.S.2d 687, 688 (App. Div. 2d Dept. 1981).

69. Kelly v. Lewis, 632 N.Y.S.2d 186, 186 (App. Div. 2d Dept. 1995). David D. Siegel described impracticability as showing due diligence used with § 308 subdivisions 1 and 2 plus the additional showing that service under subdivision 4 will not work either. Coyne v. Coyne, 443 N.Y.S.2d 472, 473 (App. Div. 4th Dept. 1981) (quoting David D. Siegel, New York Practice 81). There is no need to perform a statutory act of service if it would be futile and thus impracticable. *Id.*

prior attempts to serve a party under each and every statutory method have been pursued.[70] In *Salesi v. Nieves*, a wrongful death action, alternate service was granted where there was no need to show "prior attempts at service upon defendant, nor was 'due diligence on the part of the plaintiff required."[71] Plaintiff was permitted to mail service to the defendant's last known address and to his liability insurance company.[72] In *Saulo v. Noumi*, a medical malpractice action, the plaintiff successfully met the impracticability requirement by submitting affidavits from her attorney, the injured party, and the process service. The affidavits "detailed the repeated attempts to personally serve the individual defendant and the inability of the plaintiffs to determine his whereabouts despite substantial inquiry."[73] Although the defendant was never actually served, these affidavits showed plaintiff's inability to effect service despite her substantial inquiry and repeated attempts.[74]

In *Tremont Fed. Sav. & Loan Ass'n v. Ndanusa*, an action to foreclose on a mortgage, the court held that prior attempts at service need not be shown to find impracticability. Here, alternate service via publication was deemed proper despite the defendant's allegations that the process server had lied when he said service had been attempted on numerous occasions.[75]

In *Deason v. Deason*, a divorce action, the only two prescribed methods of service,[76] personal and publication, were deemed impracticable even though publication was never attempted.[77] The Appellate Division upheld service via e-mail

70. Tremont Fed. Sav. & Loan Ass'n v. Ndanusa, 535 N.Y.S.2d 8, 9 (App. Div. 2d Dept. 1988); *see also*, Hitchcock v. Pyramid Ctrs. of Empire State Co., 542 N.Y.S.2d 813, 814 (App. Div. 3d Dept. 1989); *Coyne*, 443 N.Y.S.2d at 472.

71. Salesi v. Nieves, 461 N.Y.S.2d 361, 361 (App. Div. 2d Dept. 1983).

72. *Id.*

73. Saulo v. Noumi, 501 N.Y.S.2d 95, 96-7 (App. Div. 2d Dept. 1986).

74. *Id.*

75. *Tremont*, 535 N.Y.S.2d at 9.

76. N.Y. C.P.L.R. § 308 refers to N.Y. DOM. REL. LAW § 232, which precludes the use of substituted service under § 308 subdivisions 2, 3, and 4 in matrimonial actions.

77. Deason v. Deason, 343 N.Y.S.2d 276 (Sup. Ct. 1973). A year prior to the present case, *Deason* went before the Court of Appeals, which ruled that the local government must bear the cost of service via publication for indigent

per C.P.L.R. § 308(5) because the court found service by publication was a burden on the county taxpayers where the wife proceeded as an indigent plaintiff and the defendant could not be located to effect personal service.[78]

A plaintiff seeking to effect alternate service must make a showing that the other prescribed methods of service could not be made.[79] This is often in the form of affidavits from attorneys, plaintiffs, and process servers. In *Simens v. Sedrish*, the plaintiff assumed she would have difficulty serving the defendant because her predecessor in interest had difficulty in effecting service. The plaintiff served the defendant via e-mail then made an application to the court for an order authorizing such service, nunc pro tunc. The application was denied because nothing in the record "indicated what steps, if any, plaintiff had initiated on her own behalf to effect service pursuant to the prescribed methods, and why those methods proved impracticable."[80] Thus, without sufficient evidence, a motion for alternate service will be denied.[81] Impracticability requires a factual showing that may be presented with affidavits, receipts, search records, and cost analysis that

plaintiffs so as not to deny access to the courts in violation of the 14th Amendment's Due Process Clause. Deason v. Deason, 296 N.E.2d 229, 230 (N.Y. 1973). To reduce the cost to the local government, and because service pursuant to N.Y. C.P.L.R. § 308(5) may only be granted upon a motion, the New York Court of Appeals invited the parties to apply for a determination if judicially devised service under N.Y. C.P.L.R. § 308(5) is permissible instead of service by publication. *Id.*

78. *Deason*, 343 N.Y.S.2d at 278-79. Plaintiff and the county joined in an ex parte motion requesting to serve defendant by mailing the summons to the homes of defendant's mother and his sister. *Id.* The court granted the motion, finding that although not every single method of service was attempted, plaintiff had exhausted all other reasonable possibilities of statutory service, noting that N.Y. C.P.L.R. § 308 and N.Y. DOM. REL. LAW § 232 preclude the use of substituted service under subdivisions 2, 3, and 4 in matrimonial actions.

79. Simens v. Sedrish, 440 N.Y.S.2d 687, 688 (App. Div. 2nd Dept. 1981); *see* Coyne v. Coyne, 443 N.Y.S.2d 472, 473 (App. Div. 4th Dept. 1981) ("[A] factual foundation precisely specifying time, when, place where and methods used to satisfy the service requirements must be spelled out from supporting affidavits of those with first-hand knowledge. A showing that is merely inconvenient . . . is not sufficient to meet the statutory test of 'impracticable.'").

80. *Simens*, 440 N.Y.S.2d at 688.

81. *Coyne*, 443 N.Y.S.2d at 472.

service by the other prescribed methods is futile.

C. *Step 3: Demonstrate that Service Is Reasonably Calculated to Provide Notice*

In order to protect a defendant's 14th Amendment right of due process, service of process must provide notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.[82]

Because there is no precise test for this constitutional requirement,[83] courts scrutinize the facts of each situation to determine if the prescribed method of service will reasonably provide a defendant notice of the litigation. In *Phillip Morris USA Inc. v. Veles, Ltd.*, the defendant's business appeared to be conducted entirely through electronic communications because it only operated online stores and no physical addresses were posted on its websites.[84] Similarly, in *Chanel, Inc. v. Zhixian*, the defendant operated an entirely online business without disclosing its physical location.[85] In each case the plaintiffs showed that service by e-mail was likely to reach the defendants. In *Phillip Morris*, the "plaintiff had amply demonstrated the high likelihood that the defendants would receive and respond to e-mail communications" by showing that the defendants conducted their business extensively through their website and that they regularly correspond with customers via e-mail.[86] In *Chanel, Inc.*, the court found that e-mails had presumptively reached the defendant because numerous e-mails sent to an e-mail address provided by defendant had not bounced back.[87]

Showing a course of conduct that parties communicated via

82. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); Milliken v. Meyer, 311 U.S. 457, 463 (1940).

83. *Mullane*, 339 U.S. at 314.

84. Philip Morris USA Inc. v. Veles Ltd., No. 06 CV 2988 GBD, 2007 WL 725412, at *1 (S.D.N.Y. Mar. 12, 2007).

85. Chanel, Inc. v. Zhixian, No. 10-CV-60585, 2010 WL 1740695, at *1 (S.D. Fla. Apr. 29, 2010).

86. *Philip Morris*, No. 06 CV 2988 GBD, 2007 WL 725412, at *3.

87. *Chanel, Inc.*, 10-CV-60585, 2010 WL 1740695, at *3.

e-mail supports a finding that e-mail service is reasonably calculated to notify a defendant of an action against her. In *Safadjou v. Mohammadi*, a divorce case, the record showed that the parties had been communicating via e-mail for several months through the e-mail addresses that were on record.[88] Additionally, the defendant acknowledged receiving e-mails from the plaintiff's attorney which were sent to the same e-mail address.[89]

IV. Service by E-Mail is a Valuable Tool for New York Courts

Although service of process by e-mail is increasingly authorized by the courts under C.P.L.R. § 308(5), this type of service still raises concerns. E-mail is treated as a casual form of communication. There is no guarantee that an e-mail will reach its intended recipient. Spam filters may sweep it away, it may be deleted, or be merely overlooked in a crowded inbox. Unlike a signed postal receipt, there is no affirmative acknowledgement by the intended recipient that the message was received. A return receipt will be initiated by any person who happens to open the e-mail.

Courts recognize these afflictions and generally refuse to allow such excuses. Similarly, courts discourage the lazy plaintiff by requiring a finding that service by statutory means is impracticable. The constitutional requirement of "reasonably calculated to provide notice" permits courts to do everything in their power to reach defendants. Such practices include follow-ups via telephone, text message, publication, and postal mail. In their exercises of judicial discretion, courts thus far have not relied solely on e-mail service so that neither the oblivious defendant nor the nefarious defendant can avoid justice.

However, e-mail should not be treated as a primary means of notice. The facts of how people use e-mail create too great a risk. People frequently e-mail the wrong recipient and some e-mail accounts are only reluctantly used. Those seeking to evade service can apply filters and block senders or they can change

88. Safadjou v. Mohammadi, 964 N.Y.S.2d 801, 803-04 (App. Div. 4th Dept. 2013).

89. *Id.*

e-mail addresses every few weeks. The drafters of the C.P.L.R. contemplated that service will occasionally fail to actually notify defendant.[90] This hazard comes with all methods of service, not just e-mail. The C.P.L.R. provides a remedy by allowing a person "to defend [an] action within one year" after she knows a final judgment is against her.[91] In this way, an oblivious defendant may still be heard even after a final judgment. The risks of adding e-mail into our regular tool box for notice are adequately addressed within the C.P.L.R. Service via e-mail is gaining traction as an appropriate method of alternate service.

The benefits of e-mailed service far outweigh the risks so long as the court continues to direct other safeguards to maximize notice to the defendant. With adherence to C.P.L.R. § 308(5)'s three-part test, e-mail will continue to provide a valuable and efficient service to New York's justice system.

"< < < < < < < < < < < <Message Deleted> > > > > > > > > > >"

90. Dobkin v. Chapman, 236 N.E.2d, 451 (N.Y. 1968) (discussing N.Y. C.P.L.R. § 317).

91. *Id.* (citing N.Y. C.P.L.R. § 317).